act of 1868. Each count charges positive fraud—the first and second, fraudulent use of stamps, unknown under the act of 1867; and the third count charges fraudulent entries and fraudulent reports. It may well be that a distinction was intended to be made. Passive violations of law, mere neglect, may have been regarded less culpable than active transgression. All the causes of forfeiture enumerated in the sixty-ninth section of the act of 1868, upon which all the counts in the information are based, are of the latter character. We cannot hold, therefore, that the limitation of the proviso to the 25th section of the act of 1867, which the claimants have pleaded, is any protection to them. It follows that the judgment of the Circuit Court dismissing the information must be reversed.

The judgment of the Circuit Court is

REVERSED, AND THE CAUSE IS REMANDED FOR FURTHER PROCEEDINGS.

COOK v. BURNLEY.

1. The title of Juan Cano, a colonist in the empressario grant of Martin De Leon, and to whom the commissioner of that colony conveyed a league of land April 11, 1835, was a good title. The case of *White* v. *Burnley* (20 Howard, 235), thus deciding, affirmed.
2. A suit pending in a State court between parties not the same as in a suit here cannot be pleaded in abatement in the Federal courts; nor can a suit pending be pleaded in abatement after a plea to the merits; nor where it is insufficient in law.
3. In the case of a deposition taken *de bene esse* under the 30th section of the Judiciary Act, the omission of the magistrate to certify that he reduced the testimony to writing himself, or that it was done by the witness in his presence, is fatal to the deposition.
4. On a question of limitations and possession, a statement by a witness in a deposition taken *de bene esse* and without notice, that "he knew that the defendant and his tenants had continued possession" from a date specified, held to have been properly excluded, as being testimony to a matter of law and fact mixed; the witness having already testified to the fact of the defendant's possession and of that of his tenants, naming them, and of the time they held possession, and when they left the premises

5. By the laws of Texas a junior locator of a warrant is not entitled to claim as an innocent purchaser; where, as far back as 1838, a map of the names of colonists, claimants, and grantees of head-right leagues, was deposited in the general land office of that republic, and where such junior locator had actual notice of the prior grant.
6. Refusals to grant a motion to change the venue or to postpone a trial are not subjects for a writ of error.

ERROR to the District Court for the Eastern District of Texas, in a suit brought by Burnley and Porter against Cook, Eller, Elam, and several others. The case was thus:

Along the coast of Texas, small tide-water bayous, or inlets, extend from the Gulf of Mexico, and from larger bays or inlets like that of Matagorda, into the land. They frequently connect with each other, and with the gulf or bays, by other and similar channels. Being surrounded in many states of the tide, and sometimes in all, by a thread of water, they may, in one sense, be called "islands;" but lying as they nearly all do within the regular profile of the coast, and entitled to an insular name only by some depression in the original soil, which has invited the ebb and flow of the water in that direction, they can hardly be regarded as coming within the meaning of "islands" in that sense which has in most of our States made islands a sort of soil excepted by their governments from ordinary grants of soil; or in any sense which would exclude them from a grant of land on the coast generally.* In this state of the physical form of the coast, Burnley and Porter brought suit against Cook and others to recover a league of land situate on the western shore of Matagorda Bay, near the mouth of the river Lavaca, in Calhoun County, Texas. The parcel in immediate controversy lay north and adjoining Powderhorn Bayou, and comprised one hundred and seventy-nine acres. A part of the defendant's defence was based on the assumption that a portion of what the plaintiffs claimed was an island.

* The reader will see a more full account of this configuration of the Gulf Coast, with an illustrative diagram, in *Cavazos* v. *Trevino*, 6 Wallace, 775, 778; where one of the islands was likened to Long Island.

Statement of the case.

Having pleaded the general issue and the statute of limitations, and it being agreed by writing that under the general issue the defendant might prove every fact which he could under a special plea, the defendants put in, without verification by affidavit, a plea in abatement, alleging the pendency of a suit commenced in a State court of Texas, by Burnley and one *Jones* as plaintiffs, against the present defendant, Cook, and others; not all of them, however, the same persons as the defendants here. The suit in the State court, as the plea represented, set forth title to the same league of land as was now sued for; the laying out of a town site thereon, the location thereon by Cook of a land certificate for three hundred and twenty acres, the commencement of a rival town enterprise, acts of trespass and waste, and it prayed an injunction, which was obtained; also damages $10,000, and general relief. The court below struck out this plea in abatement on the ground, 1st, that it was filed after answer to the merits; 2d, that it was not verified by affidavit; 3d, that it was not sufficient in law.

The case being called for trial, the defendant, Cook, applied for a continuance, on the ground of the absence of a witness; he having previously obtained one continuance on affidavit, and having agreed to a peremptory order of trial. The application was overruled.

After this he moved for a change of venue, supported by an affidavit setting forth certain statements with reference to himself, in a publication alleged to have been made by the judge of the court below; his belief that the judge had prejudged his cause; and that he could not obtain a fair and impartial trial. This motion was made under the act of March 3, 1821, providing that "in all suits and actions in any District Court of the United States in which it shall appear that the judge of such court is in any way concerned in interest or has been of counsel for either party, or is so related or connected with either party as to render it improper for him, *in his opinion*, to sit on the trial of such suit or action, it shall be his duty, on application of either party, to cause the fact to be entered on the records of the court,"

and also an order certifying the case for trial, &c.* The court overruled this motion.

The case then proceeded to trial. The title of the plaintiffs was based on the colonization laws of Mexico, under which Martin De Leon established a colony in Texas with power to grant titles. This title came more immediately from Juan Cano, a colonist in this empressario grant, and under a conveyance from the commissioner of De Leon, April 11th, 1835. Under this same settlement of De Leon grants similar to the present one had been made adjoining this one to one Benito Morales, and on a suit by this same plaintiff, Burnley, and one Jones, against the same Cook who was the principal defendant here; which suit came finally before this court in the case of *White et al.* v. *Burnley*,† several years ago. The land, in this present grant to Cano, was described as situated *on* the western bank of the Mother Lake (*Laguna Madre*) of Matagorda, commencing at a stake that stands upon the deep brake of *said* lake, and after being carried by courses and distances around three sides, to a point where a stake was driven in the deep brake of the *said* lagoon, for the fourth and last landmark, . . . followed the bends of the lagoon to the place of beginning. It was represented as containing forty-six millions of square varas. Appended to this grant was a plot or diagram.

The plaintiffs then made title from Cano to one L. Manso, and by deed, dated in Louisiana, April 6th, 1836, from Manso to one Grayson. At the time when this last deed was made, Texas, then an independent republic and not yet a State of the American Union, was at war with Mexico. Manso had been long resident at one time in Mexico, but whether ever a citizen of it was not so clear. He was a native of Spain, and at the time of this grant was temporarily resident in Louisiana, having been expelled from Mexico under some laws driving away Spaniards, and was purposing to go to Texas when its war with Mexico should be ended.

The defendants objected to the reading of the grant from

* 3 Stat. at Large, 643.

† 20 Howard, 235.

Statement of the case.

De Leon to Cano, because the title had not been recorded in the county where the land was situate, and neither recorded nor deposited in the general land office of Texas. The ground of the objection apparently was, that the legislature of Texas had by statute enacted, on the 20th of December, 1836, that any person owning lands should, within twelve months, have his titles proved in open court, and recorded in the county where the land lies; and that no deed should affect the rights of third parties unless proven and recorded. And that on the 14th of December, 1837, it was further enacted that it should be the duty of every person having titles to deposit them in the general land office within sixty days.

It was shown, however, by the testimony of one Edward Linn, who had been surveyor of the Victoria district (where these lands lay), from 1838 to 1840 and from 1847 to 1854, when examined, that he had made a connected map of a survey in that district and deposited it in the general land office in 1838, and that the head-right lease of Cano, whom he knew, and knew to be a colonist in the colony of Martin De Leon, along with head-right leases of other colonists, including Manso, already named, and one Benito Morales, with all the lands titled by the commissioner who had made this grant, were laid down on this map, and that Cook, when he made his location on the head-right leases, knew of these "colonial titles."

To the reading of the deed from Manso to Grayson the defendants also objected, because at the time of making it Manso was an alien enemy to Grayson, his grantee. The court overruled both the objection to De Leon's deed, and that to the deed of Manso, and both deeds were read.

In the course of the trial, and coming to the defendants' case, the defendants offered to read a deposition of one H. Beaumont, taken *de bene esse*, under the thirtieth section of the Judiciary Act. This section provides that the witness "shall subscribe the testimony by him or her given after the same shall be reduced to writing, which shall be done only by the magistrate taking the deposition, or by the de-

ponent in his presence." There was no certificate here by the magistrate that he reduced the testimony to writing himself, or that it was done by the witness in his presence.

Proceeding further, the plaintiff having on his side shown residence of their tenants on the lease from the spring of 1848 to the time of trial, the defendant sought to show by the deposition of certain persons, named respectively Moore, Schwatz, and Howeston, that tenants of Cook had been in possession of that same place from a date which countervailed the plaintiff's evidence. The depositions ran thus in the case of each witness respectively:

"Witness knows that Cook and his tenants have had continuous possession of said land since the fall of 1849 to the present time." "Since fall of 1849, Cook, by his tenants and those holding under him, has had continuous possession of said land; said possession he knows to have been continuous." "As the tenant of Cook, as witness understood, that witness knows that said Cook, by himself and his tenants, held possession continuously ever since May or June, 1850."

These statements were ruled out by the court, on the objection of plaintiff: 1st, that they were conclusions of law, and not matters of fact; 2d, that they were loose and indefinite, without the names of persons, and without dates or times, or any statement of the facts which in their mind constituted tenancy and possession. Facts stated by the witnesses, showing the names of the witnesses, the time when they came and when they went, were let in. Subsequent depositions of the same witnesses, taken on notice and cross-examination, were read.

The defendants, who asserted that their land was an island, and not capable of having been granted under De Leon, claimed under title from the State of Texas in favor of Cook, one of the defendants. This title was not disputed except as it was asserted to embrace lands claimed by the plaintiffs as within the earlier grant to Cano. The defendants' title as made out without the rejected depositions was as follows:

Statement of the case.

A certificate for 960 acres of land, issued to one Gwartney, December 15th, 1837. Conveyance of same by Gwartney to Cook, December 16th, 1837. A survey of 179½ acres of land north of Powderhorn Bayou, with 1100 varas front on the bay, by virtue of said certificate, made May 15th, 1850. Location of this certificate as follows:

"LOCATION No. 339, January 5th, 1847.

"*To the County Surveyor of Victoria County:*

"Will please survey 320 acres on bounty warrant No. 990, on Matagorda Bay, at the mouth of Powderhorn Bayou, on the northwest side; thence up the bay and back for quantity.

"W. M. COOK."

This was set up as a location of the 179½ acres of land to the date, and as sustaining the plea of limitation from January 5th, 1847.

Next a patent for said 179½ acres of land, issued May 16th, 1857.

The plaintiffs, on the other hand, to show that Cook had *abandoned* his location of the Gwartney certificate of January 5th, 1847, proved a location made by Cook, as follows:

"*Location, No.* 429, *Sept.* 12, 1849.—W. M. Cook locates land warrant, No. 5072, issued to J. A. Wells, for 320 acres of land, commencing at the east corner of a survey made for D. N. White, on the southwest side of Matagorda Bay; thence down the bay to Powderhorn Bayou; thence up the bayou and back, for quantity."

They proved, also, a survey of the same 179½ acres north of Powderhorn Bayou, made by the said Cook, by virtue of land certificate to Wells, May 15, 1850, recorded on the 29th same month; and that on the 13th January, 1851, by the direction and request of said W. M. Cook, the field notes and survey of this 179½ acres were altered and transferred to the land warrant 990, the Gwartney certificate.

As the reader will have perceived, one of the defendants' defences was, the plaintiff's grant did not embrace within

its legitimate boundaries the land which Cook had located on, and which the defendants were now claiming. To show the reverse of this and the true designation and character of the land granted, the plaintiffs relied on the diagram or plot attached to their grant, and forming part of their testimonio of title, as the evidence of the original survey. On a suit which had taken place about the land in the State courts, Beaumont, already mentioned, had been directed by the court to make a survey, according to the courses, distances, and landmarks of the original survey. Field notes were furnished him by the court. He did make the survey from the field notes so furnished, and returned the land as containing 48,665,450 square yards, or 8613¾ acres; much more than a league; but another person, a civil engineer, named Thelipapa, made the map. This he made from field notes furnished him by Beaumont. But these were different from those accompanying the order of survey. The last specified distances *and the corners of the league.* The former gave distances only. Made by the corners, more than a league was included, and the case of the plaintiffs was strengthened.

The law under which the original survey was made apparently required the course of the lines to be by the magnetic needle.* From the only testimony on the point, the survey of Beaumont was by the true meridian; and by comparing and platting the two maps, it was apparent that their meridians were different.

The defendants asked the court to give these instructions to the jury:

"1st. If Manso was an alien enemy at the time he executed the deed to Grayson, he conveyed no title through which plaintiff can recover.

"2d. If plaintiff's title was not on record in the county where the land lies, or in the general land office, at the time defendant located his land warrant, and completed his survey and

* Paschal's Digest, art. 727.

obtained his patent, he is in the position of an innocent purchaser, and entitled to recover.

"3d. If the plaintiff's title includes an island surrounded by tide water, it is bad as to the island.

"4th. If the jury, from the evidence, can fairly and justly construe both the plaintiff's and defendant's title so that both can stand, it is their duty to do so."

The court refused to give any one of these instructions, and gave none but this:

"The diagram or plot attached to the plaintiff's grant is evidence to show the designation and character of the land granted, and may be used by the jury for its shape and boundaries. It appears to have been surveyed by magnetic courses, and if the survey returned by Beaumont was not surveyed by the magnetic but the true course, the jury must allow for the difference, and Beamont's cannot be regarded as showing the original survey. The fourth call is from the end of the third line with the bend of the *Laguna Madre* of Matagorda to the beginning."

Verdict and judgment having gone for the plaintiffs, the defendants brought the case here; where it was submitted *by Mr. Merriman, for the plaintiff in error; and by Messrs. Adams and Ballinger, contra.*

Mr. Justice NELSON delivered the opinion of the court.

The plaintiffs derived their title in this case from Juan Cano, a colonist, in the empressario grant of Martin De Leon, and to whom the commissioner of that colony conveyed the league of land on the 11th of April, 1835.

Several objections are taken to this deduction of title, but it is not material to notice them particularly, as they were before the court in the case of *White et al.* v. *Burnley*,* already reported, in which these several objections were overruled. The only difference between that case and the present is, that the plaintiffs, Burnley and Jones, there claimed under a deed by the commissioner to a colonist by the name of

* 20 Howard, 235.

Benito Morales for a league of land lying on the Matagorda Bay, north and adjoining this grant to Cano. Both these colonists conveyed to Leonardo Manso, one on the 27th, the other on the 20th May, 1835, from whom the present plaintiffs derived title to both tracts. Porter, in the present suit, represents the interests of Jones in the former, and Cook, the principal defendant in this, was a defendant in that one. We find no question here, as it respects the deduction of title under the grant of the commissioner, but what was taken in the former case, fully considered and overruled. White, one of the defendants there, and who is a defendant here, set up title under a land warrant, which he had located within the boundaries of the grant to Morales, and, besides his objections to the deduction of the plaintiffs' title, relied on adverse possession of three years under the junior title. In the present case, Cook sets up a like defence under the location of a head-right and survey, which is within the boundaries of the grant to Cano.

Among other defences relied on in the present case, not in the former, is a plea in abatement of a suit, commenced by Burnley & Jones, against certain defendants, for the same cause of action, including the defendant Cook, in the District Court for the County of Calhoun. This plea was stricken from the record on the ground that it was put in after the defendants had pleaded to the merits, upon general principles, and came too late. And, further, that if it had been pleaded in season it would have constituted no bar to the suit in this court.* It also appears that the parties to the suit in the State court were not the same as in the present case.

The defendants, in the course of the trial, offered in evidence the deposition of H. Beaumont, taken under the 30th section of the Judiciary Act, which was objected to and excluded. There is no certificate by the magistrate that he reduced the testimony to writing himself, or that it was done

* See the case of White *v.* Whitman, 1 Curtis, 494; Piquignot *v.* Pennsylvania Railroad Company, 16 Howard, 104, and Wadleigh *v.* Veazie, 3 Sumner, 165.

by the witness in his presence, which omission is fatal to the deposition.*

The following portions of the depositions of Moore, Schwartz, and Howeston were excluded, on objections taken by the court. The testimony had reference to the possession of the *locus in quo.*

"Witness knows that said Cook and his tenants had continued possession of said land since the fall of the year 1849, or early part of the winter of 1849–50; say December, 1849, and down to the present time."

This is in the deposition of Moore; the portions of the testimony of the other two are substantially the same. The depositions had been taken *de bene esse*, without notice, in December, 1852. In January following the depositions of these same witnesses were taken on notice to the plaintiffs, and these were given in evidence by the defendants.

On looking at the testimony in the first depositions, it will be seen that the witnesses had testified to the fact of the possession of Cook, and of his tenants, naming them; and of the time the tenants held the possession; and when they left the premises; also, the fact of the tenancy under the agreement with Cook; and, of the improvements made by the tenants. Whether or not these facts constituted a continuous possession by Cook and his tenants from the time they entered into possession, within the meaning of the statute of limitations, can scarcely be regarded as a simple question of fact, especially in connection with the previous testimony of the witnesses on the subject of their actual possession. We are inclined to think the question was rather one for the jury under proper instructions from the court. All the facts as it respects the possession had already been testified to by the witnesses from the commencement to its termination. Whether they constitute a continuous possession would seem to be a mixed question of law and fact.

We come now to the charge of the court to the jury. The defendants put in four prayers for instructions.

* Elliott *v.* Piersol, 1 Peters, 335–6.

Opinion of the court.

1. "If L. Manso was an alien enemy at the time he executed the deed to Grayson, he conveyed no title through which the plaintiffs could recover."

This question was before the court in the case of *White et al.* v. *Burnley*, already referred to, very fully considered, and overruled. We need only to refer to that case.

2. "If the plaintiffs' title was not on record in the county where the land lies, or in the general land office, at the time the defendant located his land warrant, and completed his survey, and obtained his patent, he is in the position of an innocent purchaser, and entitled to recover."

The location of Cook under his land warrant of the premises in question, was made on the 12th September, 1849, and the survey thereon the 15th May, 1850. The first location was under a land warrant issued to Gwartney, certificate No. 990, and made 5th January, 1847. But this was abandoned, and a new one made at the time above mentioned, under a certificate to J. A. Wells, No. 5072. It appears from the testimony of E. Linn, who has been the legal surveyor of the district in which the premises are situate, from 1838 to 1840, and from 1847 to the time when his deposition was taken, that as early as 1838 this survey of the plat of eight leagues of L. Manso, Cano, and Morales, granted by De Leon, the commissioner, was laid down on the public map of the district, and which was deposited in the general land office as a matter of record. This, according to the decisions in the courts of Texas, deprives the junior locator of the character of an innocent purchaser. So does actual notice of the prior grant, which is, also, proved in the present case.*

3. "If the plaintiffs' title includes an island surrounded by water, it is bad as to the island."

There is no testimony in the case tending to prove the fact.

4. "If the jury, from the evidence, can fairly and justly construe both the plaintiffs' and defendants' title, so that each can stand, it is their duty to do so."

* Gilbeau v. Mays, 15 Texas, 410.

Opinion of the court.

There is no evidence in the case warranting such an instruction. Besides, it was the duty of the court to construe the paper titles of the parties.

The court gave but one instruction to the jury. The point of the objection to it is, that the court permitted the jury to depart from the survey of the league of land by Beaumont, who had been appointed by an order of the court to make it according to the courses, distances, and landmarks in the original survey by the government at the time the grant was made. The survey on the ground was made by Beaumont in pursuance of this order, but a civil engineer by the name of Thelipapa, made the map from the field notes. He was examined as a witness, and stated that he made the map from field notes furnished him by Beaumont. But, on comparing these field notes with those accompanying the order of survey, they were found to be different. He states that he made the map from courses and distances without any call for corners. In this respect the field notes of Beaumont differed from the original field notes, as they specified, in addition to distances, the corners of the league, in the survey by the government. There was, also, some evidence that the original survey was made by magnetic courses, and the one by Beaumont by the true course, which might account for the difference between the two surveys. The court, as will be seen, suggested this to the jury, but left the question to them to make an allowance for the difference. We perceive no objection to this instruction.

Upon the subject of this survey, it is quite apparent on the evidence, that the whole of the controversy between the parties consisted in a difference of opinion as to what line constituted a boundary upon the bay of Matagorda. The defendants insisting that there is a distinction to be made between the lagunas, some of them small, others of considerable magnitude, which are formed by tidal currents extending into the land from the bay, and, sometimes connecting with each other along the greater part of this coast, and the waters of the bay itself, while the plaintiffs insist that these lagunas belong to the bay and are parts of it, and that

a line bounded on the lagunas is the same as bounded on the bay. It seems in this case quite plain that the grant to Cano was bounded or intended to be bounded on the bay, as the first line given in the description of the tract commences on the bay and terminates at the place of beginning, following down the bends of the Laguna Madre, which designates the bay or great lake of Matagorda.

There were other exceptions taken in the case to the rulings of the court in the progress of the trial, such as motions to postpone the trial, and to change the venue, which it is not material to notice further than to say, that they are not available on a writ of error.

After the best consideration we have been able to give to the case, we think there is no error in the judgment below, and it must be

AFFIRMED.

SAME CASE.

1. An application to an inferior court to supply a lost record, being matter addressed to its discretion, is not a subject for writ of error.
2. If after a lost record of a case where judgment below has been affirmed, is supplied in the inferior court, final process issue in accordance with the mandate sent to such court on the affirmance, the action of the court in granting such process will not be reviewed here.

THE judgment which is above reported as having been affirmed, was so affirmed at the December Term, 1867. A mandate accordingly issued to the court below, reciting the judgment of this court, and directing that "such execution and proceedings be had in said cause, as according to right and justice and the laws of the United States ought to be had, the said writ of error notwithstanding." This mandate was presented to the Circuit Court for the Eastern District of Texas, and ordered to be recorded; and Porter, who was now the surviving plaintiff, with the executors of his deceased co-plaintiff Burnley, applied to the court for writs of possession. But as the records of the court below had

been destroyed by fire during the late war, affidavit was made of that fact, and a carefully certified copy of the transcript in this court was presented, with a motion to have it received in lieu of the original. The plaintiffs also presented a sworn copy of the original petition, and asked to have it established as the petition in the cause. The defendant objected to the allowance of this motion, and assigned several grounds of objection of a technical character. But the Circuit Court ordered that the motion be sustained, and that a writ of possession issue. The defendants then gave notice that they would prosecute "a writ of error therefrom;" *i. e.* from the order, and the court fixed the amount of the bond at $7000, and "allowed thirty days for the filing" of the same. This order is entered December 18, 1869.

No bond having been filed or copy of writ of error lodged in the clerk's office up to January 1, 1870, the plaintiffs directed the issue of a writ of possession, which was issued; whereupon the defendant, Cook, applied by petition to the district judge, in chambers, at Austin, July 23, 1870, for a writ of supersedeas; and upon his petition an order was made for such writ, enjoining the marshal from executing the writ of possession, a copy of which order was served on the attorneys of plaintiffs. The allegation in Cook's petition, upon which this supersedeas was granted, was that he had sued out a writ of error and executed a bond, which was approved "in due and usual form in such cases," so that the order of the district judge must be understood as affirming *this* position.

The writ of error, and a copy of the bond and citation, were filed or "lodged" with the clerk of the Circuit Court on January 7, 1870, or *twenty days after* the judgment was rendered, but appeared to have been allowed and approved by the district judge on the 28th of December, 1869.

Mr. W. G. Hale, for himself, and Mr. W. B. Ballinger, now moved:

I. To dismiss the writ of error in said cause for the following causes, apparent in said record:

1st. The said writ of error is not prosecuted from any final judgment in this cause.

2d. That it is brought to reverse an order enforcing a mandate of this court, and not to reverse any judgment, order, or proceeding of the Circuit Court, from which a writ of error can lawfully be prosecuted to this court.

II. In case said writ of error be not dismissed, then that the court set aside and discharge the supersedeas to the writ of possession issued from said Circuit Court, or direct said Circuit Court so to do.

Mr. Thomas Wilson, contra.

Mr. Justice CLIFFORD delivered the opinion of the court.

Final process is never issued by this court in the exercise of its appellate jurisdiction, except in cases where a State has once refused to execute the mandate of the court. Instead of that the mandate is transmitted to the subordinate court, and where the directions contained in the mandate are precise and unambiguous, it is the duty of the subordinate court to carry it into execution, and not to look elsewhere to change its meaning.*

Two causes are assigned for the motion to dismiss the present writ, which is a second writ of error in the case sued out by the same party: (1.) Because the writ of error is not prosecuted from any final judgment in the cause. (2.) Because the writ is sued out to reverse an order of the Circuit Court carrying into effect the mandate of this court.

Where the subordinate court commits any substantial error in executing the mandate of the Supreme Court, it is well-settled law that a second writ of error or appeal, as the case may be, will lie to correct the error, and to cause the mandate to be executed according to its tenor and effect.†

Ejectment was brought on the 13th of June, 1859, by the present defendants, or one of them and the testator of the

* Skillern *v.* May, 6 Cranch, 267; Ex parte Story, 12 Peters, 339; West *v.* Brashear, 14 Peters, 51; Curtis's Commentaries, § 405.

† McMicken *v.* Perin, 20 Howard, 135; Roberts *v.* Cooper, Ib. 481

other two, in the District Court of the United States for that district, to recover the possession of certain lands described in the petition filed in that court on that day. Process was issued, and the same having been served, the defendants appeared and made defence, and the parties went to trial. Under the rulings of the court the verdict and judgment were for the plaintiffs, and the defendants sued out a writ of error and removed the cause into this court.

Prior to the institution of that suit Texas was divided into two judicial districts, called the Eastern and Western, and the acts of Congress creating those districts provided to the effect that the district judge, whether sitting in the one or the other, might exercise Circuit Court powers.*

Subsequent to the removal of the cause into this court, Texas was included in the sixth circuit, and all acts which vested in the District Courts of the United States for the District of Texas the power and jurisdiction of Circuit Courts was repealed, and the third section of the act provided that all actions, suits, prosecutions, causes, pleas, process, and other proceedings relative to any cause, civil or criminal, . . . shall be and are declared to be respectively transferred, returnable, and continued to the several Circuit Courts constituted by that act.†

When reached in order, the cause as removed here by the first writ of error was heard, and this court affirmed the judgment rendered by the District Court before the acts of Congress giving that court Circuit Court powers were repealed. Judgment was entered in that court on the 30th of June, 1859, before the State was included in the sixth circuit, but the act including the State in the sixth circuit passed before the judgment was affirmed in this court. Consequently the mandate of this court was transmitted to the Circuit Court of that district, as required by the third section of the act.

Reference to the present record will show that the mandate as transmitted was duly received and recorded, and of

* 9 Stat. at Large, 1; 11 Id. 164.

† 12 Stat. at Large, 576.

course the judgment was duly affirmed, but objection is taken by the defendants in the judgment to the subsequent action of the court.

Suggestion was made by the plaintiffs in the suit that the original petition was lost, and they moved for leave to file a copy of the same, and for a writ of possession to carry the judgment as affirmed into execution.

Objection was made by the defendants to the motion, and the parties having been heard, the court took the matter under advisement, but finally passed an order that the copy of the original petition filed by the plaintiffs be adjudged to be the petition therein, and that the writ of possession, as prayed for, do issue. Such was the decision of the court, and the same was subsequently entered as a decree, and the defendants sued out a writ of error, and removed the cause into this court to reverse that decree. Sued out, as the writ of error was, to reverse that decree, the present defendants have filed a motion to dismiss it for the reasons assigned, and the court is of the opinion that the motion must be granted.

Nothing can be more certain, in legal decision, than the proposition that an application to supply a lost writ, declaration, or other pleading, if accompanied by proof of loss, is in general addressed to the discretion of the court, and it is well-settled law, that decisions which rest in the discretion of a court of original jurisdiction, cannot be re-examined in an appellate court upon a writ of error.*

Secondary evidence of a lost record, as well as of any other instrument, is admissible after proof of the loss; but in this case the plaintiffs filed a copy from the record of the case transmitted to this court, and the Circuit Court was quite right in allowing the loss of the petition to be supplied.†

Certainly it was not error to grant a writ of possession,

* Liter *v.* Green, 2 Wheaton, 306; Silsby *v.* Foote, 14 Howard, 218; Morsell *v.* Hall, 13 Id. 212; United States *v.* Buford, 3 Peters, 12; Jenkins *v.* Banning, 23 Howard, 455; Mandeville *v.* Wilson, 5 Cranch, 15; Spencer *v.* Lapsley, 20 Howard, 264.

† 1 Greenleaf on Evidence, 12th ed. § 509.

as that was but executing the express directions of the mandate, and surely it will not be argued that it was error to order to be done what this court had commanded should be done by its mandate.

Suppose all the foregoing conclusions are correct, still it is contended that the writ of error cannot be dismissed because it is a writ of error sued out under the twenty-second section of the Judiciary Act, which, it is said, brings up the whole record.

Undoubtedly, it is true that the first writ of error was sued out under that section, and that such a writ does bring up the whole record, and it is well settled that it is no ground to dismiss the writ of error because there is no bill of exceptions, agreed statement of facts, or material demurrer in the record presenting any question of law for the decision of the appellate court, as the absence of every such question is good cause for affirming the judgment, but it is not a good ground for dismissing the writ of error.*

Grant that, still the second writ of error, though issued under the twenty-second section of the Judiciary Act, does not bring up the whole record for re-examination. On the contrary, it is equally well settled that the second writ of error brings up nothing for revision except the proceedings subsequent to the mandate; and it follows that if those proceedings are merely such as the mandate commanded, and were necessary to the execution of the mandate, the writ of error will be dismissed, as any other rule would enable the losing party to delay the execution of the mandate indefinitely, which cannot be admitted.

MOTION TO DISMISS GRANTED.

* Taylor *v.* Morton, 2 Black, 484; Minor et al. *v.* Tillotson, 1 Howard, 287; Suydam *v.* Williamson, 20 Id. 441.